

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

ORVILLE WILLIAM SCHULTZ, Petitioner, vs. STATE OF SOUTH DAKOTA, SECOND JUDICIAL COURT, Respondents.	CIV. 17-4087-KES ORDER ADOPTING REPORT AND RECOMMENDATION AND DISMISSING CASE
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Petitioner, Orville William Schultz, filed a pro se petition for writ of habeas corpus under 28 U.S.C. § 2254. The court referred the petition to a United States magistrate judge under 28 U.S.C. § 636(b) and Rule 8 of the Rules Governing Section 2254 Cases in United States District Courts.

The magistrate judge filed a report and recommends that Schultz's petition be dismissed. Objections to the report and recommendation were due by July 19, 2017.

Schultz did file objections, but the objections go to the merits of the case—why he believes he is entitled to relief—not to the issue raised in the report and recommendation, namely that Schultz filed a second or successive petition for a writ of habeas corpus without first receiving the permission of the Eighth Circuit Court of Appeals as is required by 28 U.S.C. 28 § 2244(b)(3)(A). This is Schultz's third petition for a writ of habeas corpus. The first petition was filed in Civ. No. 11-4126 and was dismissed on August 19,

2013. The second petition was filed in Civ. No. 14-4188 and was dismissed on January 29, 2015. Schultz filed this third petition for writ of habeas corpus adding the Second Judicial Court as the defendant on July 3, 2017, but the claims still arise under the same conviction. The court has considered the case de novo and adopts the report and recommendation in full.

To be clear, Schultz needs to receive permission from the Eighth Circuit Court of Appeals to file a second or successive writ of habeas corpus before this court has jurisdiction to hear his claim. Without that permission, this court is without jurisdiction to consider Schultz's request for relief. *Garrett v. Goose*, 99 F.3d 283, 285-86 (8th Cir. 1996). Therefore, it is

ORDERED that the report and recommendation (Docket 4) is adopted in full. Petitioner's pro se petition for habeas corpus is denied without prejudice.

IT IS FURTHER ORDERED that the motion to proceed in forma pauperis (Docket 6) is granted.

IT IS FURTHER ORDERED that based upon the reasons set forth herein and under Fed. R. App. P. 22(b), the court finds that petitioner has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). Therefore, a certificate of appealability is denied.

Dated August 10, 2017.

BY THE COURT:

/s/ *Karen E. Schreier*

KAREN E. SCHREIER

UNITED STATES DISTRICT JUDGE